



HUMAN RIGHTS IN HOUSING IN CANADA

An Advocate's Guide

**Produced by the Centre for Equality Rights in
Accommodation**

2008

ABOUT CERA

CERA is an Ontario-based, non-profit organization established in 1987. Its role is to promote human rights in housing and remove the barriers that keep disadvantaged people from getting and keeping the housing they need. CERA has five key objectives:

- Promote knowledge and enforcement of human rights in housing among marginalized groups and individuals.
- Provide educational materials and programs on human rights in housing to groups whose rights may have been violated, as well as landlords, social service providers and the public.
- Represent marginalized groups and individuals who believe their human rights have been infringed.
- Encourage and facilitate effective public education and enforcement of human rights by provincial/territorial, national and international commissions, agencies and organizations, and governments.
- Research human rights and housing as they affect marginalized communities.

CERA carries out these objectives through a range of activities. These include:

- Advising and helping people experiencing housing-based discrimination contrary to Ontario's Human Rights Code (Code)
- Negotiating with landlords to remove discriminatory tenant selection practices
- Helping people file formal human rights complaints with the Ontario Human Rights Commission (and as of July 1, 2008, helping them file applications with the Human Rights Tribunal of Ontario)
- Representing them throughout the complaint process.

CERA also initiates test case litigation under the Code and the Charter of Rights and Freedoms to challenge poverty and homelessness and promote the equality rights of low income and other marginalized communities.

In 2000, the organization established a national Women's Housing Program to address the fact that insecure housing and homelessness are some of the most pressing issues facing low-income women in Canada today. CERA also partnered with community-based, advocate groups in the Northwest Territories to develop a training and mentorship program around housing and human rights.

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SECTION 1

INTRODUCTION AND OVERVIEW OF THE ADVOCATE'S GUIDE

A crisis of homelessness and housing insecurity has gripped communities across Canada for the past decade. Policy-makers, politicians, the media, and advocates have put forward many possible explanations for this situation. These include the substantial cuts to social assistance and employment insurance programs, the increasing prevalence of low-wage, unstable employment, rent deregulation, the cancellation of social housing programs, and the lack of new rental housing supply. What is often overlooked, however, is the role played by discrimination.

Discrimination in the housing market takes many forms – it can be obvious or subtle, intentional or accidental:

- A single mother staying in a shelter is refused over and over again by landlords because she has children and receives social assistance.
- A family new to Canada is required to pay six months rent in advance because they have no Canadian credit or landlord references.
- An aboriginal woman goes to view a vacant apartment and is told it has just been rented. The “for rent” sign continues to be posted in front of the building.
- An advertisement for an apartment in a local newspaper says, “Looking for a professional couple.”
- A young woman is turned down for an apartment because she does not yet have one year of full-time, permanent employment.
- A woman is forced to return to an abusive relationship when she can't find a landlord who will accept her without a credit history.

Whatever form it takes, discrimination is a key determinant of homelessness and housing insecurity and contributes substantially to the impoverishment of vulnerable households such as single mothers, women leaving abusive relationships, teenage girls and boys, people with disabilities, members of racialized communities, newcomers to Canada, aboriginal people, young families with children, and households receiving social assistance.

For these individuals and families, the already small “pool” of affordable rental housing becomes much smaller, forcing them to rent over-priced,

cramped, low quality housing. They are forced out of neighbourhoods and into ghettoized apartment buildings that are run down and poorly located. Many are forced into homelessness.

The goal of this advocate's guide is to give housing workers and service providers the knowledge and tools to enable them to overcome – using human rights law and principles – the discriminatory barriers that preclude people from getting and keeping the housing they need.

THE SECTIONS OF THE GUIDE

Section 2 discusses the fundamentals of human rights – the basic principles that guide the application and enforcement of human rights.

Section 3 explores the particular types of discrimination in housing that are prohibited under Canadian legislation.

Section 4 discusses the legal “duty to accommodate” as it relates to disability.

Section 5 gives an overview of the procedures for enforcing human rights protections in various Canadian jurisdictions.

Section 6 examines the issue of human rights primacy and the operation of human rights laws in administrative tribunals such as housing tribunals.

Section 7 explores strategies for working with human rights claimants.

CERA believes, and international human rights law affirms, that there is a **fundamental human right to adequate housing**. It is from this perspective that we have approached the development of this advocate's guide. CERA approaches its own daily work from the same perspective.

Please note:

This guide is not a substitute for legal advice. If you need legal advice, please contact a lawyer. CERA and its funders will not be held liable for any loss or damage caused by reliance on any statement, made negligently or otherwise, contained in this Reference Guide.

SECTION 2

FUNDAMENTALS OF HUMAN RIGHTS

WHAT ARE HUMAN RIGHTS?

The concept of human rights has evolved over the last 4000 years. The *Universal Declaration of Human Rights* (UDHR), adopted by the United Nations in 1948,¹ embodies and codifies the modern, accepted world standard for human rights.² The UDHR states: “All human beings are born free and equal in dignity and rights.” To this end, it recognizes the inherent dignity and inalienable rights of all members of the human family as the foundation for freedom, justice, and peace in the world.

The UDHR further states that all human beings are entitled to all the rights and freedoms set out in the UDHR *without distinction* of any kind, including distinction based on such things as race, colour, sex, language, religion, political opinion, birth, and national or social origin. Since the adoption of the UDHR, human rights protections have evolved to also include ethnic origin, place of origin, creed, age, disability, sexual orientation, marital status, family status, gender identity, political belief, political association, family affiliation, social condition, and criminal conviction.³

Eighteen years after its adoption, the UDHR was separated into two covenants: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).⁴ These Covenants expanded the rights and protections afforded under the UDHR and together form the **International Bill of Rights**.⁵

The basic principles of equality and dignity enshrined in the UDHR, the ICESCR and the ICCPR form the basis of modern human rights legislation in Canada and across the globe. They embrace the notion that all human

¹ Leifer, R. and Tam, J. Human Rights: The Pursuit of an Ideal, Available at: <http://library.thinkquest.org/C0126065/>

² Bailey, P., *The Creation of the Universal Declaration of Human Rights*, Available at: <http://www.universalrights.net/main/creation.htm>. **See also**, Leifer, R. and Tam, J. Human Rights: The Pursuit of an Ideal, Available at: <http://library.thinkquest.org/C0126065/index.html>

³ See for example *Human Rights Act*, S.N.W.T. 2002, c. 18; *Human Rights Code*, R.S.O. 1990, c. H.19.

⁴ Leifer, R. and Tam, J. *Supra*.

⁵ See: <http://www.unhchr.ch/html/menu6/2/fs2.htm>. The optional Protocols to the ICCPR also comprise the International Bill of Rights.

beings have the right to be free from any form of discrimination (based on the characteristics noted above) in the attainment of their rights and protections. Rights to non-discrimination and equality are particularly relevant to people who face disadvantages such as poverty. Vulnerable groups include Aboriginal people, women, single mothers, people with disabilities, visible minorities, newcomers to Canada, the elderly, and the young.

Human rights can provide an effective means to review governments' performance in areas such as health, education, income security and housing. Human rights litigation and advocacy are important mechanisms for holding governments accountable for their actions or their failure to act.

THE IMPORTANCE OF HUMAN RIGHTS IN CANADA

Provincial and territorial human rights legislation, along with the *Canadian Human Rights Act*, govern human rights in Canada. Unlike the *Canadian Charter of Rights and Freedoms*, these human rights laws are not part of the Constitution. However, the courts have recognized that they are **quasi-constitutional** in nature. The Supreme Court of Canada held that human rights legislation “is not to be treated as another ordinary law... It should be recognized for what it is, a fundamental law.” In keeping with this, courts and tribunals, in applying human rights legislation, should aim to give it a liberal or broad interpretation that accords with its important purpose, which is to “declare public policy.”⁶

Human rights legislation also takes precedence over, or “trumps” other legislation. For example, if there is a conflict between a human rights law and residential tenancies legislation in the same jurisdiction, the human rights law takes precedence. It has what is called “paramountcy.”

The courts have also held that no one can “contract out” of their human rights. Any agreement or contract that purports to do so will be null and void.

MODELS OF EQUALITY: FORMAL AND SUBSTANTIVE

FORMAL EQUALITY

Formal equality assumes that equality is achieved if the law treats all persons alike. However, when individuals or groups are not identically situated (for example, a black woman versus a white man), the formal

⁶ Zinn, R., and Brethuor, P. *The Law of Human Rights in Canada: Practice and Procedure*, (Canada Law Books) at p.1-2,3 (Insert October 2005).

equality model tends to perpetuate discrimination and inequality, because it cannot address **real inequality in circumstances**.⁷ In fact, by treating different individuals as equals despite unequal access to power and resources, formal equality creates an illusion of equality while allowing real economic, legal, political, and social disparities to grow.⁸

Formal Equality Example: Mortgage Loan

Two people apply for a mortgage loan. The first is a single mother who can only work part-time, contract hours because she cannot afford full-time childcare. Although she works part time, she has not been unemployed at any time during the past 8 years. If she is able to qualify for a mortgage, her monthly mortgage payment will be less than her current market rent and she will be able to afford full-time child care and will then be able to get a better paying, full-time job, get a car, etc. She has a perfect rental payment record. The second applicant is a single man with no children who works full time. If he qualifies, he will also be able to pay less for a mortgage than he does in rent.

They complete **identical** bank loan applications and the bank uses **identical** criteria to evaluate each application. The applicants must answer questions on the application regarding job security. When the bank reviews the applications, the woman does not qualify because she is a part-time contract employee. The single man does qualify and the woman continues to be denied the benefits of home ownership.

SUBSTANTIVE (REAL) EQUALITY

Achieving substantive equality requires that the **effects** of laws, policies, and practices, be examined to determine whether they are discriminatory.⁹ Substantive equality requires that the *roots of inequality* be identified, the goal of equality of opportunity be established, and that a legal mechanism be established that will achieve this goal in a principled way.

Substantive equality requires that rights be interpreted. It requires that policies and programs – through which rights are implemented – be designed in ways that take women's socially constructed disadvantage into account. The design should secure for women the equal benefit, in real terms, of laws and measures, and provide equality for women in their material conditions. The adequacy of conduct undertaken to

⁷ Day, S., and Brodsky, G. (1998) *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs*, Chapter 2 "Women's Equality: The Normative Commitment". Available at: http://www.swc-cfc.gc.ca/pubs/0662267672/index_e.html at p. 43

⁸ See Factum of the Intervenor Canadian Council of Disabilities. Available at: <http://www.ccdonline.ca/law-reform/Intervention/andrews%20factum.htm> at Part III Argument, par. 3.

⁹ *Ibid* at p.1.

implement rights must always be assessed against the background of women's actual conditions and evaluated in the light of the effects of policies, laws, and practices on those conditions.¹⁰

Substantive Equality Example: Mortgage Loan

Using the example above, imagine that the bank's mortgage loan application criteria accommodated the very real differences in each of the applicants' lives. In order to obtain real equality, the bank's evaluation criteria would look at each applicant's circumstances and consider the fact that even while the single mother was employed on a part time basis, her rental and work records were perfect. Moreover, while her employment was contractual, she was consistently and steadily employed. The bank's criteria would recognize that her priority, particularly because she had children to care for, was to make sure she kept a roof over their heads.

A substantive equality approach to the bank's criteria would recognize that the effect of identical treatment of women and men would result in the exclusion of a large proportion of women from securing loans. This approach requires us to understand women's material conditions, including their marginalization in the labour force and their role as unpaid, primary caregivers.

The goal of human rights legislation is to achieve **substantive equality** for all.

WHAT IS DISCRIMINATION?

People discriminate when they make a distinction, whether intentional or not, based on a characteristic or perceived characteristic **and** this has the *effect* of imposing burdens, obligations, or disadvantages on an individual or group. Discrimination withholds or limits access to opportunities, benefits, and advantages that are available to others.¹¹ There are different types of discrimination.

DIRECT DISCRIMINATION

When most people think of discrimination, they think of direct discrimination. For example, landlords are discriminating directly then they advertise a unit as "adult only," precluding families with children from living there.

¹⁰ Montréal Principles on Women's Economic, Social and Cultural Rights, *Human Rights Quarterly* 26 (2004), pp. 760-780, at p. 768.

¹¹ Day and Brodsky, *Supra*, note 7, at p.1-3 (Insert October 2005).

CONSTRUCTIVE OR ADVERSE EFFECT DISCRIMINATION

“Constructive” or “adverse effect” discrimination is a subtler and arguably more widespread form of discrimination. Constructive discrimination refers to rules, policies or practices that may not be **intentionally** or **obviously** discriminatory, but which have a discriminatory **effect** on persons protected by human rights legislation. For example, a landlord who requires that all prospective tenants have at least 5 years employment history constructively discriminates against young people, newcomers, young mothers, and potentially other protected groups. This is because these groups are unlikely to be able to meet the criterion.

INTENTION AND DISCRIMINATION

Intention is **not** necessary to a finding of discrimination. A person who complains of discrimination is not required to prove that the discrimination they encountered was intended. A finding of discrimination can be made even where someone is acting in good faith. For example, it would be discriminatory for a landlord to prohibit a family from living in an apartment building because they thought the stairs were too steep for the children to navigate.

Discrimination occurs when the **effect** of a distinction is to impose a burden, disadvantage, additional obligation, or to limit access. This is so whether the distinction was made in good faith or bad, intentionally or not.

Note that a finding of discrimination can be made even when the discrimination constitutes only one of several conflicts going on between a landlord and a tenant.

PROTECTED GROUNDS OF DISCRIMINATION

Human rights laws protect people from discrimination based on particular “grounds” that are listed in the relevant legislation. The following are protected grounds of discrimination commonly found in Canadian jurisdictions.

- **Sex or gender:** This includes pregnancy. Québec and Nunavut include pregnancy as a separate ground of discrimination. The Northwest Territories includes gender identity.
- **Marital and family status:** Québec includes “civil status” and the NWT includes “family affiliation”.

- **Race, colour, ethnic origin, and ancestry:** Nova Scotia includes Aboriginal origin. Québec prohibits discrimination based on language. The Yukon prohibits discrimination based on linguistic origin.
- **Place of origin or national origin:** Ontario and Nunavut also include citizenship. The *Canadian Human Rights Act* and the human rights legislation of Manitoba, the NWT, and Saskatchewan include nationality.
- **Religion or creed:** In the Yukon, this includes religious belief, association, or activity.
- **Age:** In Ontario, age protections related to housing only apply to people over the age of 15. British Columbia, Saskatchewan, and Newfoundland allow housing to be restricted to people over the age of 55. Alberta's human rights legislation does not protect people from age discrimination at all. In most provinces and territories, teenage boys and girls living away from their parents are not protected from age discrimination.
- **Disability:** This includes both mental and physical disability. Nova Scotia also prohibits discrimination based on an irrational fear of contracting an illness or disease.¹²
- **Sexual orientation**
- **Source of income:** Ontario and Saskatchewan include "receipt of public assistance". Newfoundland includes "social origin". New Brunswick, Québec, and the Northwest Territories include "social condition".
- **Political belief:** Eight provinces and territories include political belief, association, or activity as protected grounds of discrimination.

Definitions and interpretation of protected grounds of discrimination may vary between different provinces and territories. Most of the definitions are self-explanatory or have been clearly defined by courts and tribunals. Several require clarification though, and this is provided below.

POSSIBLE INTERPRETATIONS OF PROTECTED GROUNDS

Ethnic Origin: An ethnic group can be seen as a distinct population within a larger population. The group's culture is usually different from that of the larger population. The group should have a long, shared history and its own cultural traditions. It may also have a common language, literature, religion, and geographical origin. It may be an

¹² This ground was included so that people living with HIV/AIDS would be adequately protected. Tarnopolsky, Walter and Pentney, William, *Discrimination and the Law* (Thomson Carswell: 2004) at 2006 – Rel. 3.

oppressed community.¹³ The definition of ethnic group can include people that are born into the group, and those that have chosen to become members. While the concept of ethnicity and ethnic group may be somewhat based on race, it can be viewed as broader than the concept of race. It is possible to have distinct ethnic groups within a racially homogeneous society.¹⁴

Nationality and Citizenship: There is little case law in Canada that distinguishes between “nationality”, “national origins”, and “citizenship”. The leading case on this subject is actually a British case that determined that “national origin” referred to the nation in which a person was born, while citizenship describes a person’s legal connection to a country. The meaning of nationality can be seen as encompassing both the idea of citizenship and also the separate concept of an individual’s racial ties to a country.¹⁵ While there are few cases on the subject in Canada, courts appear to treat nationality and citizenship interchangeably as describing a person’s legal ties to a country.¹⁶

Creed: Case law from the federal level and from Ontario holds that creed is interchangeable with religion and religious belief, but that it is not related to political belief.¹⁷

Family and Marital Status: “Family status” and “marital status” are only defined in Ontario, Saskatchewan, Alberta, and Nova Scotia. Nunavut’s *Human Rights Act* defines “family status”, but not “marital status”. In these jurisdictions, marital status refers to the state of being married, single, separated, divorced, or living in a common-law relationship. In Nova Scotia, Ontario, and Saskatchewan, family status refers to the status of being in a parent and child relationship. Case law clarifies that this includes the relationship between a child and the adoptive parent. Alberta and Nunavut have a broader definition that refers to the status of being related by blood, marriage, or adoption. The consensus in Canadian case law appears to be that marital status relates to relationships with a “spousal” quality, while family status can apply to a broader range of relationships. These include the relationship between spouses, siblings, in-laws, uncles, aunts, nephews, nieces, cousins, and so on, as well as the parent-child relationship.¹⁸

¹³ *Mandla v. Dowell Lee*, [1983] 1 All E.R. 1062.

¹⁴ Tarnopolsky, W., and Pentney, W., *Supra*, at 2006-Rel.3 5-30.

¹⁵ *London Borough of Ealing v. Race Relations Board*, [1972] A.C. 342.

¹⁶ Tarnopolsky, W. and Pentney, W., *Supra*, at 2005-Rel.5 5.40-5.41.

¹⁷ Keene, J., *Human Rights in Ontario, Second Edition* (Carswell: 1992) at pp 62-71.

¹⁸ Tarnopolsky, W. and Pentney, W., *Supra*, at 2004-Rel.4 9-3 and 9-23.

Social Condition: Currently only Québec, New Brunswick and the Northwest Territories prohibit discrimination related to social condition. In CERA's view, the term "social condition" is preferable to the more restrictive related grounds of "source of income" and "receipt of public assistance", which are frequently seen in human rights laws. While the term has no commonly accepted meaning, one commonly quoted definition can be found in the case of *Québec Commission des droits de la personne du Québec v. Gauthier*¹⁹:

The definition of "social condition" contains an **objective component**. A person's standing in society is often determined by his or her **occupation, income or education level, or family background**. It also has a **subjective component**, associated with the perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred. (*Emphasis added*)

Social condition can be seen as a ground of discrimination that overlaps with other protected grounds, but in a way that enhances their protection.²⁰ This illustrates the concept of **intersectionality** in human rights. This means that people tend to experience discrimination on a variety of inter-related grounds at the same time. (We'll discuss this in greater detail below).

Unfortunately, in practice "social condition" is often used as a proxy for discrimination based on source of income. This is a very limited approach. As the case law cited above suggests, social condition should be interpreted in a broad, liberal, and flexible manner, and should take into account a variety of factors. If the term is interpreted in this manner, it could prove to be an effective tool for the promotion of economic and social rights in Canada.

MULTIPLE GROUNDS OF DISCRIMINATION

Human rights laws also protect people from discrimination on the basis of two or more grounds, or the effect of a combination of protected grounds. In CERA's experience, people dealing with housing

¹⁹ *Québec (Comm. des droits de la personne) c. Gauthier* (1993), 19 C.H.R.R. D/312 (T.D.P.Q.).

²⁰ Mackay, A. W., Piper, T. and Kim, N. (1999) *Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act*. Prepared for the Canadian Human Rights Act Review.

discrimination frequently experience discrimination on a number of different, interrelated grounds. For example, when an Aboriginal single mother receiving public assistance applies for an apartment, she will frequently experience discrimination based on her race and colour, her sex, her family and marital status, and her source of income – all at the same time. This kind of discrimination is qualitatively different from discrimination based on individual grounds, because the various grounds can reinforce each other and intensify the experience of discrimination. Discrimination on multiple grounds is far more than the "sum of its parts".

DISCRIMINATION BASED ON ASSOCIATION

Human rights laws in Canada prohibit discrimination because of a person's relationship – either actual or presumed – with an individual or class of individuals identified by a protected ground. For example, if a landlord refuses to rent to a mixed-race couple because one member of the couple is black, the landlord has not only discriminated against the individual who is black, but also against the partner. This prohibition is explicit in Manitoba, Nova Scotia, the Northwest Territories, Nunavut, Ontario, PEI, and the Yukon. In other jurisdictions, the prohibition of discrimination because of association is implied in the general anti-discrimination provisions.²¹

²¹ Tarnopolsky, W. and Pentney, W., *Supra* at 2001-Rel.6 9-83.

SECTION 3

DISCRIMINATION IN HOUSING

PROHIBITIONS WITH RESPECT TO RESIDENTIAL ACCOMMODATION

All human rights legislation in Canada includes specific prohibitions against discrimination in residential accommodation. Whether you live in British Columbia, Prince Edward Island, or anywhere in between, landlords cannot deny you the right to live somewhere, or discriminate against you in any of the terms of occupancy, on the basis of a protected ground of discrimination.

“TENANCY”

Most human rights legislation prohibits discrimination broadly with respect to the “occupancy of residential accommodation”. The prohibition can include a range of housing options, both rental and owned. Some legislation, however, such as that of the Northwest Territories, Nunavut, Alberta, and British Columbia uses the more narrow terms “tenant” or “tenancy” when describing the prohibited discrimination. Although the word “tenant” usually means someone who is renting from a landlord, this is not necessarily the case in law. For example, the British Columbia Council of Human Rights held that, “‘Tenancy’ is a broad term, indicating the right to occupy property through ownership, lease or rental (*The Oxford Concise Dictionary*).”²² In CERA’s view, the term tenant should encompass people in a range of housing, including members of housing co-operatives and even, in certain circumstances, condominium owners.

That being said, it is possible that some human rights adjudicators will take a restrictive definition of “tenant”. In cases where a condominium owner believes there was discrimination on the part of the condominium board of directors (also called a “strata corporation or council”), it might be safer to refer to sections of the human rights law that refer to discrimination related to “public services”. This approach is supported by a recent decision of the British Columbia Human Rights Tribunal, which confirmed that strata corporations provide a service to

²² *Emard v. Synala Housing Co-Operative* (1993), 26 C.H.R.R. D/106 (B.C. Council of Human Rights) at p. D/113.

owners of condominiums that could be considered a “public service” under the B.C. *Human Rights Code*.²³

SELF-CONTAINED DWELLING UNITS

While many jurisdictions have a broad approach to the types of residential accommodation covered by human rights legislation, protections are typically restricted to people living in “self-contained dwelling units”. Newfoundland’s *Human Rights Code* defines a self contained dwelling unit as a “dwelling house, apartment or other similar place of residence that is used or occupied or is intended, arranged or designed to be used or occupied as separate accommodation for sleeping and eating.”²⁴ Generally, the concept of a self-contained dwelling unit presumes that the tenant has a living environment largely independent of the owner’s.

Where provincial or territorial legislation does not specify “self contained dwelling unit”, it will usually include an exemption when an individual rents a room and shares either the kitchen or bathroom with the owner or the owner’s family. In Manitoba and Nunavut, people who live in a self contained apartment in a duplex – or some other kind of dwelling with two units – are not protected by human rights legislation if the owner or the owner’s family lives in the other unit. While the Saskatchewan *Human Rights Code* does not have a blanket exemption for this kind of dwelling, it does allow such owners to refuse potential renters based on their sex or sexual orientation.

DISCRIMINATORY HARASSMENT

It is also illegal under human rights legislation for a landlord to harass a resident on the basis of any protected ground of discrimination. In most jurisdictions, prohibitions against discriminatory harassment are explicit in the legislation. Where this is not the case, such as in British Columbia, Alberta, PEI, and Saskatchewan, harassment can be captured under the general provisions against discrimination. New Brunswick and Nova Scotia explicitly refer to harassment only in terms of sexual harassment. Prohibitions against sexual harassment usually refer also to sexual solicitation – where a person in a position to grant or deny a benefit, such as a landlord, makes a sexual advance and knows or ought to know that the advance is unwelcome.

²³ *Konieczna v. Owners Strata Plan NW2489 (No.2)* (2003), 47 C.H.R.R. D/144, 2003 BCHRT 38.

²⁴ *Human Rights Code*, RSNL 1990, Chapter H-14.

Harassment in human rights legislation typically requires a “course of conduct” and not just one incident of unwelcome behaviour. However, a certain particularly offensive action or comment could violate human rights laws if it is determined to have created a “poisoned environment”.

In CERA’s experience, tenants frequently confuse harassment that would be covered by residential tenancies legislation with discriminatory harassment. For example, a tenant who is forming a tenants’ group or complaining about maintenance problems may feel that a landlord who harasses has violated human rights laws. But unless the harassment is directly related to a protected ground of discrimination – or is sexual harassment – it will not fall under human rights legislation.

While not stated explicitly in legislation, if one resident is subjecting another resident to discriminatory harassment, the landlord may also have a responsibility to ensure that the harassment stops. A landlord who is aware of a problem and takes no action to stop it may be violating human rights laws.

DISCRIMINATORY PUBLICATIONS

Every province and territory in Canada except the Yukon explicitly prohibits displaying, publishing or broadcasting notices, signs or other representations that are discriminatory. With respect to housing, violations are usually found in signs posted on buildings, or advertisements placed in newspapers, rental publications, and online apartment listings.

Rental advertisements that include phrases such as, “No kids,” “Singles or couples preferred,” “Suitable for professional couple,” “Working single,” “Looking for Christian family,” and so on, are illegal in most jurisdictions.

When a discriminatory advertisement is placed in a newspaper or magazine, it is not only the landlord that is liable, but also potentially the publisher. It is in the best interests of the publishers to carefully screen ads to ensure that they are in compliance with human rights legislation. When helping someone file a human rights complaint about a discriminatory publication, it is important to include the publisher in the complaint. The complainant may then be able to have the publisher print information on discrimination as part of a settlement.

TENANCY APPLICATIONS

While human rights legislation frequently defines acceptable and unacceptable areas of questioning for employment application forms and

interviews, there is no similar clarification for rental applications. The closest we have to prescriptions for asking appropriate questions is in a regulation associated with Ontario's *Human Rights Code*. It specifies that a landlord:

...may request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant. (s. 1(1)).
...[and] may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1). (s. 1(3)).²⁵

Ontario's legislation allows landlords to use this information to select tenants, but not in a manner that would result in refusing accommodation based on a protected ground of discrimination. Newfoundland's *Code* also allows landlords to use "income information, credit checks, credit references, rental history, guarantees and other similar business practices in selecting prospective occupants."²⁶

While most human rights laws do not specify what questions may be asked on rental application forms, landlords should be careful when asking questions unrelated to credit, tenancy history, or proof of income. In a recent human rights case in Ontario, asking for the age of prospective occupants on an application form was found to be an act of discrimination.²⁷

In CERA's view, questions on an application form that directly relate to a protected ground of discrimination – such as marital status or age of children – should be challenged as discriminatory. These questions could be argued to be discriminatory representations, as discussed above. Also, questions on the application form related to a protected ground may be used as evidence of an *intention* to discriminate.

REPRISAL

Under federal, provincial and territorial human rights legislation, it is illegal to retaliate against a person who tried to make a human rights complaint. It is also illegal to take action against someone for helping with the complaint. This means that a landlord who tries to evict, intimidate, coerce, harass, impose a financial penalty, deny a right, or otherwise treat

²⁵ *Human Rights Code*, R.S.O., 1990, Chapter H.19, Ontario Regulation 290/98.

²⁶ *Human Rights Code*, RSNL 1990, Chapter H-14.

²⁷ *St. Hill v. VRM Investments Ltd.* (2004) CHRR Doc. 04-023, 2004 HRTO 1.

a person unfairly because they tried to enforce their human rights would be breaking the law.

Ontario's and Manitoba's Codes explicitly prohibit retaliation against individuals who refuse to contravene the legislation. For example, a superintendent or property manager who refuses to follow an employer's discriminatory policy should not be penalized or fired. This also appears to be inferred in the Yukon *Human Rights Act*, which states that:

It is an offence for a person to retaliate or threaten to retaliate against any other person on the ground that the other person has done or proposes to do anything this Act permits or *oblige*s them to do. (*Emphasis added.*)²⁸

This type of reprisal would likely be considered illegal in other jurisdictions, even though it is not explicitly prohibited.

DEFENCES TO DISCRIMINATION

A landlord can challenge a charge of discrimination if it can be shown that the discriminatory policy or practice is **bona fide** and has a **reasonable justification**. (This is sometimes shortened to "BFRJ".) To help make this determination, the Supreme Court of Canada developed a three-part test, which, while formulated in the employment context, can be easily transferred to housing situations.²⁹ To benefit from the BFRJ defence, the landlord has to establish that the discriminatory rule, policy, or practice:

- (a) was adopted for a reason that is rationally connected to the purpose of the housing program or business; and
- (b) was adopted in the honest and good faith belief that it was necessary for fulfilling that legitimate housing program or business-related purpose; and
- (c) is reasonably necessary for fulfilling that legitimate business/program-related purpose, and the landlord has done everything they can to address the needs of the individual or group affected (i.e. the landlord has accommodated the particular needs of the individual or group to the point of "**undue hardship**")

Case law and human rights policy in a number of jurisdictions suggest that, to demonstrate undue hardship, a landlord will need to prove that accommodating the needs of an individual would result in an

²⁸ *Human Rights Act*, Revised Statutes of the Yukon 2002, Chapter 116, S.30.

²⁹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (Hereinafter *Meiorin*).

unreasonable health or safety risk. In other words, the risk would have to outweigh the benefit of promoting equality. The provider would also have to argue that the costs would be so high as to change the essential nature of the business or threaten its viability, and that no funding is available from outside sources. (We'll discuss the "duty to accommodate" and "undue hardship" in more detail in the next section of the guide.)

As an example, consider the use of "minimum income rules" to screen prospective tenants. Many landlords set a minimum income criterion for their apartments, such as requiring that the rent represent no more than 30% of a tenant's income. These rules have been found to discriminate against many protected groups, including people receiving social assistance, people with disabilities, newcomers to Canada, and women, because these groups often cannot meet the requirements.

Landlords have argued that defining a minimum income is a reasonable practice that is clearly connected to the goal of running a rental housing business. They believe that they need to have these cut-offs to stay in business. However, landlords have not been able to prove that the need is real, or that it would be financially ruinous to accommodate the circumstances of social assistance recipients and other low income households by removing these rules. While landlords may be able to meet the first two parts of the Supreme Court test for a bona fide and reasonable justification, they cannot meet the third.

AFFIRMATIVE ACTION PROGRAMS AND OTHER EXCEPTIONS

Programs or activities that aim to eliminate the disadvantage of individuals or classes of individuals identified by a protected ground of discrimination – affirmative action programs – do **not** violate human rights legislation. For example, housing restricted to single mothers, women leaving abusive relationships, young people, or homeless people is legal if its purpose is to reduce the disadvantage of these groups. Individuals can still file human rights complaints against landlords when they discriminate in ways not justifiable in terms of the purposes of the program. For example, housing restricted to Aboriginal people that excludes families with children could be challenged if the "adults only" aspect of the program was not justified.

Human rights laws allow other exceptions connected to housing. For example:

- British Columbia's *Human Rights Code* allows housing to be restricted to persons with mental or physical disabilities where the housing is designed to meet their needs.

- British Columbia, Saskatchewan and Newfoundland allow housing to be restricted to seniors.
- In Saskatchewan, PEI, the Yukon, Newfoundland and Labrador, and Ontario housing can be restricted to people of the same sex.
- In the Yukon and the Northwest Territories, landlords are allowed to give preference to family members.

EXAMPLES OF DISCRIMINATION IN HOUSING

Human rights legislation is not explicit about what policies or practices constitute illegal discrimination. As a result, it is often difficult to determine whether a rule or practice is in violation of a human rights Code or Act. In CERA's experience, landlords frequently violate human rights legislation – even when they have an understanding of the law – because they do not realize that what they are doing is discriminatory. Below is a discussion of some common types of discrimination related to housing, with a focus on types of discrimination that may be "hidden" in neutral policies or rules.

SEX

Marie is a divorced woman with three children. Because of her divorce, she was forced to declare bankruptcy. Marie heard from her parents that a nice three-bedroom apartment was coming available in their neighbourhood. She was very excited, as her parents' neighbourhood was close to the shopping centre and library, and because it would make it easier for them to help with childcare. When Marie called the property manager to see if she was accepted, the manager said her application had been rejected because of her poor credit rating. Marie explained that, until her divorce, she'd had a perfect credit rating. She also explained that she had never had any problems paying the rent on time and that she has excellent landlord and employment references. The property manager replied that she would need a good credit rating to be accepted as a tenant.

There are a variety of situations where housing policies or requirements might discriminate against women. For example, women leaving a relationship are much more likely than men to be entering the housing market with no credit or landlord references. Those who do have a credit record may have a negative one as women frequently suffer significant financial hardship after a break-up. Landlords should be flexible in applying credit and reference requirements to women who are entering the rental market after leaving a relationship.

Preferring applicants with stable, long-term employment can discriminate against recent immigrants, young people and individuals living on social assistance. It can also disadvantage women who are disproportionately represented in unstable, marginal employment, and who may have had their work life disrupted for care-giving responsibilities.

RACE, COLOUR, ETHNIC ORIGIN AND ANCESTRY

After a year of dating, Vicky (an Aboriginal woman) and Pete (a non-Aboriginal man) decided to move in together. They saw an advertisement for a 1-bedroom apartment and made an appointment to view it. Vicky decided to check out the apartment while Pete went grocery shopping. Pete said he would drive by the apartment building after shopping to get Vicky. When Pete arrived at the building, Vicky was waiting by the sidewalk. She said the landlord told her the apartment was already rented. Vicky and Pete thought this seemed suspicious, as they had just called the landlord a few hours earlier. Pete decided to check into the apartment himself. While Vicky waited at the car, he went to the building and buzzed the landlord. The landlord opened the door and when Pete asked about the apartment, the landlord said it was available and offered to show him the unit.

Landlords who want to keep people out because of their race, colour, ethnic origin or ancestry, seldom say it directly. They may lie and say the apartment is already rented. Sometimes they take an application and delay processing it. They will sometimes discriminate by asking for:

- co-signors or guarantors
- proof of immigration papers or landing papers
- proof of a social insurance number to receive an application or sign a lease

Harassment based on a person's race, colour, ethnic origin or ancestry can take the form of racial slurs or attempts to make a tenant's life miserable so that they'll leave. However, it is worthwhile pursuing a human rights complaint only if there is reliable evidence that the harassment is related to race or ethnicity. Other forms of harassment are dealt with under residential tenancy law.

PLACE OF ORIGIN AND NATIONALITY

Ajit immigrated to Canada with his wife, Swapna, in November 2006. In December, he went to view a two-bedroom apartment that was for rent. Ajit and Swapna were not yet working but they had \$50,000 to support themselves until they could find work. When the landlord saw on their application form that neither was employed, he asked how they would afford the apartment. Ajit told him about their savings and offered to show him the bank balance. The landlord refused but he demanded that Ajit and Swapna pay twelve months rent as a deposit.

When dealing with newcomers to Canada, landlords need to be flexible. Many immigrants arrive without a job. These people have to rely on savings for a period of time. Landlords should take this into consideration when assessing the applications of newcomers.

Landlords who require immigrants or refugees to pay extra rent in advance are in violation of human rights laws in cases where extra rent is not required from other tenants.

Human rights tribunals in Ontario have held that it is discriminatory to refuse an applicant because they have no previous rental history or credit rating, or because the relevant records cannot be obtained. This is because they recognize that there is a difference between a **bad** credit rating or a **poor** reference from a previous landlord, and **no** credit or landlord references. To refuse people in these situations would unjustly disadvantage recent immigrants and refugee claimants who have no access to Canadian credit or landlord references. While this does not mean that landlords cannot request credit and landlord information, it does mean they cannot use this information in a manner that discriminates.

AGE

Because of stereotypes, it is often very difficult for young people to access rental housing. Many people assume that young people will be noisy, damage the apartment, or not pay the rent.

When a landlord refuses to rent to someone because of their age, that landlord is likely violating provincial or territorial human rights legislation. If a landlord refuses to rent to young or first-time renters because they do not have credit or landlord references, they should be challenged. This type of rental policy makes it impossible for young people to access housing. Similar rules that require a potential renter

to have been employed for a certain length of time also unfairly disadvantage young people.

There are significant qualifications to age protections. Many provinces and territories have defined age limits in their human rights legislation that start at 18 or 19 years of age, or at the “age of majority.” And in the jurisdictions that do not have minimum age limits - such as Manitoba, Nova Scotia, the Northwest Territories, Nunavut, PEI, Québec and the Yukon - provincial/territorial legislation that sets the minimum age for making contractual agreements acts as an effective minimum age for human rights protections related to housing. In these jurisdictions, landlords could likely argue that it would impose undue hardship to require them to rent to a person they cannot enforce a contract against (i.e. a contract to pay rent).

As a result, teenage boys and girls who are living away from their parents – a group that is particularly disadvantaged with respect to housing – will often not be protected when landlords turn them down based on their age. Ontario’s *Human Rights Code* is the only law in Canada that addresses this problem by including specific protections for 16 and 17 year olds that are living away from their parents. The section states that a lease signed by a 16 or 17 year old is legally binding.

Older people also experience significant barriers to accessing and retaining housing. Landlords who have minimum income requirements can make it difficult for anyone living on a pension or other fixed income to rent an apartment. Many landlords are also hesitant to rent to older people for fear that they will become disabled – and a “burden” to the landlord – in the future. Where an elderly tenant does develop health conditions that require modifications to their unit or an apartment building, landlords will frequently avoid making the necessary changes, forcing the tenant to either live in uncomfortable, unhealthy – and often dangerous – circumstances, or try to find alternate housing. Sadly, “aging in place” is impossible for many elderly tenants.

FAMILY STATUS

Karen is married and has four children – three daughters and one son. When she called a rental office to inquire about a three-bedroom apartment she saw advertised in the local newspaper, the building's rental agent told her that the apartment was still available. The agent then asked who would be living there. When Karen described her family, the rental agent told her that management of the building allows a maximum of five people to reside in a three-bedroom apartment. Karen then told the rental agent that she and her husband would share one bedroom, while the four children would share the other two. To this, the rental agent responded, "boys and girls cannot be in the same bedroom." Karen was told not to apply for the apartment.

In CERA's experience, discrimination against families with children is widespread. The following examples show you common forms of family status discrimination.

Overcrowding:

Because of the disparity between family incomes and housing costs, low income families frequently need to move into apartments that are smaller than would be ideal. Landlords often refuse to rent to these families on the basis of arbitrary rules limiting the number of occupants in units of a particular size. A couple with four children, for example, may be told that six people cannot live in a three bedroom apartment, even though it is not legally overcrowding to have children share bedrooms. Unless the rules relate to compliance with established overcrowding, occupancy or health and safety legislation, a landlord should not refuse a family because of the number of people in the household. Also, landlords should not refuse to rent to a family because of rules prohibiting children of the opposite sex from sharing bedrooms.

"Adult Only":

In every province and territory it is illegal to declare a building "adult only" or for a landlord to declare a unit "not suitable for children". It is also likely illegal to designate certain floors for people with children and certain floors for people without children.

In most jurisdictions, "Adult Lifestyle" condominiums are also likely contrary to human rights legislation. In Ontario, adult only by-laws in condominiums have been declared by the courts to be of no force and effect.³⁰ If someone is harassed by other condominium

³⁰ *Dudnik v. York Condominium Corp. No. 216 (No. 2)* 12 CHRR D/325, affirmed (1991) 14

residents or excluded from buying a condominium because of children, that person should challenge it.

Apartment Transfers:

It is not unusual for landlords to refuse to transfer families who need a larger apartment because of a change in their family status. Many landlords contend that internal transfers are difficult to administer. However, growing families are often desperate to remain in the same building and neighbourhood where they have established supports and where their children are enrolled in schools. Case law in Ontario has established that landlords have a duty to accommodate the needs of families with additional children by allowing them to transfer in a timely fashion to a larger unit if requested.³¹

In applying this case law, however, it is important to restrict it to people whose needs for a transfer are clearly related to having additional children. There are no human rights protections for those who simply want to transfer to a larger unit out of preference, or who want to move to an apartment with a better view.

Reasonable Children's Noise:

Sometimes, landlords harass or try to evict families with children because of normal, everyday children's noise. Often these are buildings where some tenants or the owner would prefer to have tenants with no children. A certain amount of noise is to be expected from families with children – children play, cry, laugh, yell, run around, and do other “noisy” things. As long as parents make a reasonable effort to minimize their children’s noise, landlords should not threaten to evict them – or treat them unfairly in any other way - because of noise problems. To do so could be considered discrimination based on family status and may be in violation of provincial/territorial human rights legislation. These situations should be addressed through a human rights claim and before the residential tenancies tribunal. The tribunal should consider these arguments.

C.H.R.R. D/406; *Leonis v. Metropolitan Toronto Condominium Corp. No. 741* (1998), 33 C.H.R.R. D/479 (Ont. Bd. Inq.).

³¹ *Ward v. Godina* (1994), C.H.R.R. Doc. 94-130 (Ont. Bd. Inq.).

SOURCE OF INCOME/RECEIPT OF PUBLIC ASSISTANCE/SOCIAL CONDITION

Dave is unemployed and is receiving social assistance. He responded to a newspaper ad for a bachelor apartment. When he told the superintendent that he was receiving social assistance, the superintendent said, "If you're receiving welfare, you'll have to provide a co-signor. That's the policy in this building". Because Dave did not have a co-signor, he was unable to apply for the apartment.

In CERA's experience, one of the most common forms of housing discrimination is against people receiving government income supports, especially for those receiving welfare or disability benefits. Women are disproportionately represented in this population.

Prejudice against low-income people is so pervasive in Canadian society that it is challenging to convince landlords that they are violating anyone's human rights by having a "no welfare" rule. Landlords are often quite comfortable stating explicitly that they will *not* rent to people receiving social assistance. Frequently, a refusal will be prefaced by, "I've had trouble with people on welfare in the past."

However, asking applicants about income and employment is not prohibited in human rights laws. Some legislation states that landlords can ask for income information and use it when assessing prospective tenants, subject to qualifications that will be discussed below.

"Preference":

While it is clearly a violation of human rights laws to refuse to rent to someone or to treat them unfairly because they are receiving government income supports, it is also illegal to give preference to people who are in paid employment. For example, landlords should not advertise that they are looking for working people. A landlord should not turn down an applicant receiving social assistance in favour of someone who is working because the landlord prefers someone with employment income. It is also discriminatory for a landlord to respond more quickly to maintenance issues or concerns from tenants who are employed or those who are paying full market instead of subsidized rent.

Direct Payment of Rent:

Landlords should not automatically require social assistance recipients to provide direct payment of rent from the local social services office. However, direct payment of rent can be a requirement if the landlord

has legitimate reasons for turning down the application (for example, the tenant has a history of defaulting on paying rent).

Co-Signor or Guarantor Requirements:

A landlord cannot ask potential tenants on social assistance for a co-signor or guarantor when this requirement is not made of other applicants. A Manitoba human rights board decision, *Spence v. Kolstar*³², found that a co-signor requirement applied to social assistance recipients and other low-income applicants was illegal.

Income Criteria and "Rent-to-Income" Rules

A controversial human rights issue is landlords' use of affordability criteria, often called "minimum income criteria" or "rent-to-income ratios" to screen out prospective tenants. Many landlords refuse to rent to prospective tenants who they believe would have to pay too high a percentage of their income on the rent. Often, landlords will use 30% to 35% of income as a cut-off. In 1998, a human rights tribunal in Ontario ruled that the use of rent-to-income ratios to select tenants is a violation of the province's *Human Rights Code* because it unfairly disqualifies groups such as women, single parents, families with children, racial minorities, young people and people receiving social assistance.³³ The human rights tribunal in *Kearney v. Bramalea Ltd.* found that there is no evidence that lower income tenants are more likely to default on rent. Usually it is an unpredicted change in circumstances such as losing a job that leads to default. Despite confusion caused by a poorly drafted 1998 regulation associated with the *Human Rights Code* which permits the use of income information in the tenant selection process, the *Kearney* decision has been upheld in a number of more recent Ontario decisions.³⁴

There have also been cases in other jurisdictions where landlords who refused to rent to individuals based on their income level were found to have violated human rights laws.³⁵

In CERA's view, income discrimination in housing is a critical human rights issue. Due to arbitrary affordability cut-offs, low income renters are frequently turned away from the most affordable apartments. Since a high proportion of individuals that belong to groups protected by

³² *Spence v. Kolstar Properties Inc.* (1986) C.H.R.R. D/3593 (Manitoba Board of Adjudication).

³³ *Kearney v. Bramalea Ltd.* (No.2) (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.).

³⁴ *Vander Schaaf v. M & R Property Management Ltd. and Gerald Pearlstein* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq.); *Sinclair v. Morris A Hunter Investments Ltd.* (2001), 41 C.H.R.R. D/98 (Ont. Bd. Inq.); *Ahmed v. 177061 Canada Ltd.* (2002), 43 C.H.R.R. D/379 (Ont. Bd. Inq.).

³⁵ *Birchall v. Guardian Properties Ltd.* (2000), 38 C.H.R.R. D/83; *Neale v. Princeton Place Apartments Ltd.* (2001), 39 C.H.R.R. D/161.

human rights legislation – such as social assistance recipients, recent immigrants and refugees, single parent families, women, people with disabilities, etc. – cannot meet these affordability cut-offs, permitting the use of minimum income criteria and rent-to-income ratios makes the protections for these individuals meaningless. It is of no value to a single mother receiving social assistance to know that a landlord cannot refuse her because she is receiving welfare, when that same landlord can turn her away because her income is deemed to be too low. More human rights complaints related to income discrimination need to be brought forward.

SECTION 4

DISABILITY AND THE DUTY TO ACCOMMODATE UNDER HUMAN RIGHTS LEGISLATION

Simone is a single mother living with her 18-year-old daughter, Lise. Lise has spina bifida and must use a wheelchair to get around. Simone and Lise live in a building that has stairs leading to the front entrance. As a result, they have to enter and leave the building through the garbage storage room that has a small ramp leading to it from the outside. Besides being an offensive way to have to enter and leave the building, the steel door to the garbage room is hard for Simone to open. Simone and Lise have spent years trying to persuade the company that owns the building to make it accessible for by installing a ramp and automatic doors at the front of the building. The company has repeatedly refused, saying that it would be too expensive and that it would be better for Simone and Lise to move to an accessible building.

THE SOCIAL COMPONENT TO DISABILITY: "SOCIAL HANDICAPPING"

The Supreme Court of Canada has recognized that there is a social component to disability. It has called this social component "social handicapping." What this means is that society's response to persons with disabilities is often the cause of the "handicap" that persons with disabilities experience. For example:

- elevators without Braille or transit systems without sound systems that prevent persons who are blind from using them independently
- a landlord who refuses to install an accessible shower, which forces a person who could otherwise live independently to rely on caregivers
- restaurants without ramps for access, preventing persons who rely on mobility aids from participating in social functions at a restaurant of their choice.

These “handicaps” are *not* caused by the disability but by the social and physical barriers that prevent independent and inclusive living with dignity.

DEFINING DISABILITY

Disability – including physical and mental disabilities – is defined broadly by human rights legislation and typically incorporates most medical conditions which affect an individual’s every day living. Differences between jurisdictions are relatively superficial and relate more to wording than actual meaning.³⁶

As an example, let’s look at the relatively comprehensive definition of disability in the Northwest Territories’ *Human Rights Act*:

Section 1.(1) “Disability” means any of the following conditions:

- a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness,
- b) a condition of mental impairment or a developmental disability
- c) a learning disability, or a dysfunction in one or more of the processes involved in understanding symbols or spoken language,
- d) a mental disorder;

(1.1) Examples of diseases or conditions that fall within paragraph (a) of the definition of “disability” include, but are not limited to, diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device.³⁷

This example illustrates the broad and inclusive nature of definitions of disability under Canadian human rights legislation. Examples of conditions that are not always explicitly referred to in human rights laws – but that are likely covered by anti-discrimination legislation – include environmental or chemical sensitivities, chronic pain, chronic fatigue, depression, anxiety disorders, post-traumatic stress disorder, and drug or alcohol addiction.

Persons with disabilities have the right to full equality when it comes to housing. In fact, landlords have a positive duty to accommodate their particular needs to the point of undue hardship.

³⁶ Tarnopolsky, W., and Pentney, W., *Supra* at 2006-Rel. 3 7A-5.

³⁷ *Human Rights Act*, S.N.W.T. 2002, c.18.

WHAT IS THE DUTY TO ACCOMMODATE?

The duty to accommodate means that structures, rules, policies or practices that discriminate may have to be changed within a reasonable timeframe to ensure that persons with disabilities are able to fully enjoy equality with respect to housing, employment, services, etc. Accommodation must be made short of undue hardship on the landlord.

WHAT ARE THE PRINCIPLES OF ACCOMMODATION?

Although there is no textbook definition of accommodation, there are underlying principles that can help us understand how it can be accomplished. The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets that person's needs, and best promotes integration and full participation.

DIGNITY

Dignity is a critical principle underlying the duty to accommodate in human rights legislation. Attempts to accommodate the unique needs of people with disabilities should do so in a manner that respects their dignity. The Supreme Court of Canada has made it clear that it is inappropriate to accommodate the needs of a person with a disability in a manner that marginalizes or stigmatizes the person, or hurts their sense of self worth. For example, it is not acceptable for a landlord to "accommodate" the needs of a tenant using a wheelchair by forcing the tenant to access the apartment through a loading area or garbage storage room.

INDIVIDUALIZED ACCOMMODATION

Another important principle is the need for individualized accommodation. The landlord must consider the unique needs of the person with a disability when determining appropriate accommodation. Landlords should not look for a "one size fits all" solution. For example, two people with the same medical condition may have very different needs.

INTEGRATION AND FULL PARTICIPATION

Related to the principal of "dignity", landlords should accommodate the needs of residents with disabilities in a way that is inclusive and allows the residents equal enjoyment of and participation in their housing.

Accommodation that segregates a disabled resident is not considered acceptable unless it is the only way to achieve substantive equality short of undue hardship.

For example, a landlord may say to a prospective tenant: "This is not an accessible building. I have another building that is accessible – you can apply for an apartment there." Equal treatment with respect to housing, and more specifically integration and full participation, requires that the person with the disability have equal access to all of the buildings - just like a person applying who does not have a disability.

DETERMINING UNDUE HARDSHIP

Landlords should accommodate the needs of individuals with disabilities to the point of undue hardship. While only Nunavut defines undue hardship in its legislation, the courts have provided guidance regarding what factors are considered in determining whether undue hardship has been reached. Key factors related to accommodation in housing include: cost, and health and safety.

COST

In determining whether the costs of accommodation could result in undue hardship, a landlord should show that these costs are quantifiable, and so substantial that they would alter the essential nature of the business or affect its viability. It is not enough for the landlord to claim that the cost of accommodation is too high. Records must be provided. In addition, before claiming undue hardship, the landlord should consider outside sources of funding to offset costs, such as funds provided through Canada Mortgage and Housing Corporation's Residential Rehabilitation Assistance Program (RRAP).

HEALTH AND SAFETY REQUIREMENTS

Health and safety risks amount to undue hardship if the degree of risk that remains after the accommodation outweighs the benefit of enhancing equality for persons with disabilities. For example, a landlord may assert that it would impose undue hardship to rent to a person with a mental disability because that person cannot live independently. Such a claim may be successful if it is established that the person with the mental disability cannot live alone **safely**. In this case, the safety risks posed both to the tenant and other residents in the building may outweigh the right to live independently.

The threshold for determining undue hardship is typically high. The term undue *hardship* presumes that accommodating a person's disability may impose some hardship. A landlord cannot point to business disruption, inconvenience or preference as the basis for failing to accommodate the needs of a person with a disability. For example, it is not relevant to the determination of undue hardship for a landlord to say that tenants in an apartment building are unhappy or uncomfortable because a person with Tourette Syndrome lives in the building.

Accommodating the needs of a person with a disability is not an "all or nothing" proposition. For example, a landlord who cannot afford to make all of the necessary changes will need to work with the resident to determine the "next best" solution. The landlord should take steps to minimize the cost by:

- distributing the cost across the entire budget of the company
- spreading out the cost over time (making the required changes in stages)
- exploring the possibility for tax deductions
- exploring creative design solutions
- engaging in expert assessment

Finally, if undue hardship is established, the person with the disability needs to be given the opportunity to pay for a portion of the modifications.

WHAT ARE THE OBLIGATIONS OF THE PERSON REQUIRING ACCOMMODATION?

If a person with a disability requires a specific change to a rule or structure, that person will need to make sure that the landlord is aware of the need for accommodation. The individual may also need to provide evidence from a medical practitioner as to why the accommodation is required. However, there is no legal requirement to disclose a diagnosis. In many cases, the person with a disability may not feel comfortable having the specifics of a condition revealed. In these situations, the person can provide medical documentation confirming that, due to a medical condition, the person has certain limitations that require the landlord to make particular changes to structures, rules or policies.

It is important that this medical documentation be specific regarding what accommodation is required. For example, a letter from a doctor stating that "X has multiple chemical sensitivities and it would be best to limit her exposure to strong chemical smells" is too vague. In this case, the doctor should describe what the landlord *needs* to do to accommodate the

tenant's chemical sensitivities (e.g. replace current cleaning materials with appropriate, scent-free products in consultation with the tenant; provide the tenant with adequate notice and alternate housing before any major maintenance/repair work is done, such as painting the halls or cleaning the carpets, etc.).

Individuals requiring accommodation must also recognize that, because of undue hardship, "ideal" accommodation may not always be possible. They need to be flexible in their requests for accommodation. For example, a landlord may not be able to make all the necessary changes at once, and may have to "phase in" the changes over time. Also, some buildings cannot be made entirely barrier free at a cost that is affordable because of their age or design (e.g. an elevator in a three story building).

It is best for the landlord and the resident to work together to determine the most appropriate accommodation.

LIMITATIONS OF THE ACCOMMODATION PRINCIPLE

The Supreme Court of Canada in *Meiorin* recognized the limitations of the accommodation principle. It has asked, citing Day and Brodsky from "The Duty to Accommodate: Who will Benefit?":

The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".

Accommodation conceived in this way, seems to be rooted in the formal model of equality. As a formula, different treatment for "different" people is the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.

In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made sometimes to deal with unequal effects. Accommodation, conceived in this way, does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.³⁸

The true spirit and goal of human rights law is to achieve genuine inclusiveness - substantive equality - and a society where differences are valued and appreciated and full integration, not just accommodation, is the norm.

AN EXAMPLE: MULTIPLE CHEMICAL OR ENVIRONMENTAL SENSITIVITIES

A human rights issue that is becoming increasingly significant in urban areas is the failure of landlords to accommodate the unique needs of tenants with environmental or multiple chemical sensitivities. Individuals with these conditions are extremely sensitive to air quality and can become ill when exposed to common air contaminants such as dust, perfumes, air fresheners, paint, smoke, mold, etc. When a tenant has an environmental sensitivity, landlords may need to do such things as replacing existing cleaning products with special scent free and non-toxic products and setting up new procedures when carrying out major maintenance or renovations.

In CERA's experience, landlords are frequently resistant to accommodating the needs of tenants with environmental sensitivities. There may be several reasons for this, including that multiple chemical and environmental sensitivities are generally not well understood and often incorrectly assumed to be psychosomatic, or "in the person's head." Another barrier to accommodating these conditions is that landlords' are reluctant to change. Frequently, accommodating a person with a disability requires a relatively simple, one time action – such as building a ramp or installing automatic doors. While these accommodations can be costly, once they are completed there are no further costs. Environmental sensitivities, on the other hand, require ongoing accommodation. They often require the landlord to make fundamental changes to procedures that may have been in place for decades. Essentially, these conditions require landlords to look at everything they do in the building through the

³⁸ Meiorin, *Supra* at par. 41

lens of the condition. Therefore, while accommodating these conditions is rarely costly, landlords may consider it an inconvenience.

In our experience it is not difficult to persuade a landlord to initially accommodate a tenant with environmental sensitivities. However, it is difficult to get them to establish new procedures and protocols that take into account the condition. As a result, victories tend to be short lived. For example, a landlord may provide temporary alternate accommodation for a tenant during major renovations to the building, but then a few months later may carry out additional renovations without providing the tenant with adequate notice or an offer of accommodation. The advocacy must then start all over again. As environmental and multiple chemical sensitivities become increasingly prevalent, it will be important to help landlords better understand the conditions and work with them to permanently change their practices. Any assistance that tenants and advocates can provide to ease this along – such as by recommending appropriate cleaning products, etc. – will be invaluable.

SECTION 5

HUMAN RIGHTS ENFORCEMENT

HUMAN RIGHTS COMMISSIONS

With the exception of British Columbia and Nunavut, all Canadian provinces and territories assign a number of interconnected powers to an independent body called 'the human rights commission'. Two of their most important responsibilities are public education and research related to human rights issues, and the processing of formal complaints related to alleged violations of the province/territory's human rights legislation.

In a number of jurisdictions, the Commission acts as "gatekeeper", screening complaints that are filed and selecting which proceed to a hearing to determine whether or not the law has been violated. This is accomplished by dismissing complaints for a variety of reasons, including:

- the complaint is "trivial", "vexatious", or made in "bad faith"
- the complaint has not been filed within the legislated limitation period (e.g.: six months from the act of discrimination in British Columbia, Ontario, Manitoba, the Yukon and Newfoundland; one year in Alberta, New Brunswick, Prince Edward Island and under the federal *Human Rights Act*; two years in Saskatchewan, Quebec, Nova Scotia, the Northwest Territories and Nunavut)
- another forum is more appropriate for the action or complaint (e.g. a residential tenancies tribunal or board)
- the complaint falls outside of the scope of the human rights legislation (i.e. the acts or omissions complained of – if they happened as alleged – do not constitute discrimination based on a protected ground) or the complaint does not have merit.

Once a human rights commission receives a complaint, it investigates the complaint. In every jurisdiction with a human rights commission other than the Northwest Territories, investigation of complaints is mandatory. Human rights commissions are also empowered to bring about a settlement between the parties, either before during or after the investigation process.

After the investigation ends, commission staff or commissioners will decide whether the complaint merits referral to the province/territory's human rights tribunal or board for a hearing and decision. Courts have

stated that commissions should not weigh conflicting evidence or assess credibility as part of this determination. This is the role of human rights tribunals. Determining whether or not a complaint has merit is not the same as deciding if the complaint will succeed at a hearing. Commissions should limit themselves to determining whether there is “a reasonable basis in the evidence for proceeding to the next stage.”³⁹

A recent decision of the Northwest Territories Supreme Court suggests that the evidence needed to warrant referral to a tribunal can be quite minimal. In an appeal of a decision of the NWT Human Rights Adjudication Panel, the Supreme Court stated:

“...there must be a reasonable basis in the evidence to proceed to a hearing. Since an adjudication panel at a hearing could accept a complainant’s version of events rather than a respondent’s, where there is contradictory evidence, the person screening the complaint should consider whether, if the complainant’s version is accepted, the complaint could be found to have merit. If so, a hearing will likely be warranted even though the respondent may be able to point to contrary evidence.”⁴⁰

This is a lower threshold than is typically applied by human rights commissions in determining whether a complaint proceeds to a full hearing before a human rights tribunal. In Ontario, CERA has found that complainants have to “prove” their case with substantial facts to get a referral. For our clients, it often feels like the Human Rights Commission is adjudicating the complaint – privately, behind closed doors. Unfortunately, challenging a human rights commission’s decision to dismiss can be difficult, as courts have typically given commissions a great deal of leeway in making this determination.

While most jurisdictions in Canada use human rights commissions to process and enforce human rights claims, there are some exceptions. In British Columbia, the provincial government shut down the province’s human rights commission in early 2003 and human rights claimants now bring their claims directly to the human rights tribunal for a decision. Similarly, Nunavut’s *Human Rights Act* does not include a human rights commission. Complaints proceed directly to the human rights tribunal.

Ontario passed legislation that will bring about major reforms to its human rights enforcement process. Under these reforms, human rights claimants can bring an application directly to the Human Rights Tribunal of Ontario

³⁹ *Syndicat des employés de production du Québec et de l’Acadie v. Canadian Human Rights Commission*, [1989] 2 S.C.R. 879, 11 C.H.R.R. D/1.

⁴⁰ *Aurora College v. Niziol*, 2007 NWTSC34 at p. 16.

for a hearing – without first going through the Ontario Human Rights Commission. The Ontario Human Rights Commission will continue to promote human rights but will shift focus from processing individual complaints to public education, research and systemic human rights litigation and advocacy. As well, the legislation mandates a publicly funded legal support centre. This centre will provide legal assistance to individual rights claimants. The new legislation is scheduled to be proclaimed in June 2008.

Complaints that are not resolved by the human rights commission go to a hearing before the province or territory's human rights tribunal, board of inquiry, or panel. "Parties" to the complaint include:

- the complainant
- the person or company named in the complaint as having violated the human rights legislation
- anyone specified by the board or tribunal
- the commission (in jurisdictions that have a human rights commission)

In jurisdictions that have a human rights commission, the commission is also usually a party and represents the public interest.

HUMAN RIGHTS TRIBUNALS

Like hearings before other administrative tribunals and boards, human rights hearings are less formal but similar to court proceedings. Parties appear before an adjudicator or a panel of adjudicators. They make submissions, present evidence, examine and cross-examine witnesses and respond to questions from the adjudicator. While the process is intended to be accessible to people who do not have legal representation, complainants may find it too complex to navigate on their own. Human rights commission staff can assist unrepresented complainants in cases where the commission is part of the proceedings.

If the hearing results in a finding of illegal discrimination, human rights tribunals, boards of inquiry and panels can order the offending party to:

- act in a way that complies with human rights legislation
- stop acting in a way that violates human rights legislation
- correct the harm caused by the violation
- try to return the complainant to the position that person would have been if the violation not occurred
- compensate the complainant for financial losses resulting from the violation

- compensate the complainant for the loss of that person's right to be free from discrimination and any injury to dignity and feelings of self-respect resulting from the discrimination

Human rights legislation is remedial, not punitive. Tribunal orders focus on returning complainant to a place that person would have been in, if the discrimination not occurred. It does not focus on punishing the individual or company that violated the law.

Typically, compensation awarded to complainants for the loss of freedom from discrimination in housing cases (called "general damages") is not high. It depends on the facts of each case. General damages awarded in recent housing discrimination cases have ranged from \$500 to \$10,000. In British Columbia, Ontario and Quebec, recent damage awards range between \$1,500 to \$2,500, \$4,000 to \$5,000, and \$3,500 to \$5,000.⁴¹

⁴¹ See for example: *Monsson v. Nacel Properties Ltd.* (2006), CHRR Doc. 06-743, 2006 BCHRT 54; *McDonald v. Schuster Real Estate Co. (No. 2)* (2005), 52 C.H.R.R. D/216, 2005 BCHRT 177; *Chauhan v. Norkam Seniors Housing Cooperative Assn.* (2004), 51 C.H.R.R. D/126, 2004 BCHRT 262; *Raweater v. MacDonald* (2004), 51 C.H.R.R. D/459, 2005 BCHRT 63; *Tanner v. Blake* (2003), 47 C.H.R.R. D/134, 2003 BCHRT 36; *Williams v. Strata Council No. 768* (No. 1) (2003), 46 C.H.R.R. D/326, 2003 BCHRT 17; *Dietrich v. Dhaliwal* (2003), CHRR Doc. 03-040, 2003 BCHRT 6; *St. Hill v. VRM Investments Ltd.* (2004), CHRR Doc. 04-023, 2004 HRTO 1; *Weiher v. Polhill* (2003), 47 C.H.R.R. D/104, 2003 HRTO 13; *Cunanan v. Boolean Developments Ltd.* (2003), 47 C.H.R.R. D/236, HRTO 17; *Ahmed v. 177061 Canada Ltd.* (2002), 43 C.H.R.R. D/379 (Ont. Bd. Inq.); *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Grandmont* (2006), C.H.R.R. Doc. 06-855, 2006 QCTDP 22; *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Huong* (2005), C.H.R.R. Doc. 05-140, 2005 QCTDP 140; *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Bernier* (2005), C.H.R.R. Doc. 05-137, 2005 QCTDP 137; *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Jacques* (2004), C.H.R.R. Doc. 04-162, 2004 QCTDP 121; *Québec (Comm. des droits de la personne et des droits de la jeunesse) et Cloutier c. Poulin* (2004), C.H.R.R. Doc. 04-058, 2004 QCTDP 110; *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Maurice* (2003), C.H.R.R. Doc. 03-309, 2003 QCTDP 98; *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Bétit* (2003), C.H.R.R. Doc. 03-148, 2003 QCTDP 94; *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Lacombe* (2003), C.H.R.R. Doc. 03-145, 2003 QCTDP 91.

SECTION 6

HUMAN RIGHTS PRIMACY AND ADMINISTRATIVE TRIBUNALS

Human rights legislation is **quasi-constitutional** in nature and takes precedence over other pieces of legislation. Human rights laws have “paramountcy” or “primacy”. Even where such primacy is not explicitly set out, the Supreme Court has held that human rights legislation “should be recognized [as] fundamental law.”⁴²

The Supreme Court⁴³ recently affirmed the importance of human rights legislation. In a 2006 decision called *Tranchemontagne*, the Court said that human rights law was “fundamental, quasi-constitutional law” that “must be recognized as a law of the people” and accordingly, “must not only be given expansive meaning, but also offer accessible application”.⁴⁴ The decision held that boards and tribunals, who have the authority to decide legal questions, **must apply** human rights legislation where a human rights issue arises in a hearing before them. The Court said that this was “consistent with [the] Court’s jurisprudence affirming the importance of accessible human rights legislation”.⁴⁵

The Court reiterated how important it is for an administrative tribunal to decide the **entire** dispute before it, particularly where that dispute encompasses human rights issues and the applicants are vulnerable:

...encouraging administrative tribunals to exercise their jurisdiction to decide human rights issues fulfills the laudable goal of bringing justice closer to the people ... [these] are not individuals who have time on their side... [they] merit prompt, final and binding resolutions for their disputes ... human rights legislation [is] often ... “the final refuge of the disadvantaged and the disenfranchised” and the “last protection of the most vulnerable members of society”. But this refuge can be

⁴² Zinn, R., and Brethuer, P., *Supra* at p.1-2,3 (Insert October 2005)

⁴³ For the purposes of this section, it is important to note that Supreme Court decisions are binding on all courts and tribunals in Canada.

⁴⁴ *Tranchemontagne v. Ontario (Dir., Disability Support Program)* (2006), 56 C.H.R.R. D/1, 2006 SCC 14. at par. 33.

⁴⁵ *Ibid* at par. 47.

rendered meaningless by placing barriers in front of it. Human rights remedies must be accessible in order to be effective.⁴⁶

These principles regarding human rights law and the recent Supreme Court ruling have important and practical implications for advocates' work with administrative boards and tribunals other than human rights tribunals. With regard to housing specifically, they imply that residential tenancies tribunals are legally obliged to consider the human rights issues that arise within landlord tenant disputes. With regard to income security, social benefits tribunals and appeal boards have an obligation to consider human rights issues raised in income benefit appeals brought before them.

While this may seem obvious, it is often a struggle to get human rights issues heard by administrative tribunals that are not specifically set up to adjudicate these claims. Advocates need to work on awareness-building. Advocates have to educate tribunals on the primacy of human rights legislation and on their obligations to consider human rights issues raised before them. Advocates can use the *Tranchemontagne* decision to assist this process.

The following situations show where tribunals should be considering human rights arguments:

HOUSING TRIBUNALS

Jonas has Tourette's Syndrome. He moved into an apartment complex last year. During the year, many tenants in the building complained about Jonas. They are uncomfortable and frightened by his behaviour. The landlord filed an application to evict Jonas for disturbing other tenants in the complex.

Jonas and his landlord are now before the local Landlord and Tenant Tribunal. Jonas' representative provides the adjudicator with medical documentation regarding Jonas' disability. The adjudicator refuses to consider the documentation or the representative's arguments regarding disability and tells Jonas that he should go to the Human Rights Commission.

In this case, the adjudicator's refusal to deal with the human rights issue may result in Jonas being evicted. It may be too late to obtain a timely resolution by filing a formal human rights complaint. In accordance with

⁴⁶ *Ibid* at par. 52, 48, 49

Tranchemontagne, the adjudicator must deal with the human rights issues, ensuring that Jonas has access to justice.

SOCIAL BENEFITS TRIBUNALS

Maz recently arrived in Canada as a refugee. She is from Ethiopia. Although she speaks Italian, Swahili and Arabic, she is just learning English and working on her comprehension. For the past three months, Maz has relied completely on social assistance. This month she got a job working Saturdays with the janitorial staff in her community centre. She is thrilled because she has a job – even though it is one day a week – and she has a little bit of extra income.

One day while working, Maz sees her caseworker. She approaches her, proudly says hello and tries to tell her about the job. The caseworker responds, but Maz is not really sure what she says. A week later Maz receives correspondence from the caseworker advising her that her social assistance has been cancelled due to her failure to report income. A hearing is scheduled for the following week. At the hearing, it becomes clear that Maz did not understand that she had to report any additional income and it also becomes clear that this failure is the result of her limited English comprehension.

Maz's representative at the hearing tells the social benefits adjudicator that under human rights law, Maz's situation should be accommodated and that her benefits should not be cancelled.

SECTION 7

WORKING WITH HUMAN RIGHTS CLAIMANTS

This section provides advocates with practical strategies for assisting clients who have experienced discrimination related to housing.

PROVIDING ADVICE: WHAT IS YOUR ROLE AS AN ADVOCATE?

The advice you can offer potential human rights claimants about their rights depends on your qualifications and your position. If you decide to represent claimants in human rights cases, you have to have professional liability insurance to cover this activity. Otherwise, you need to be supervised by a lawyer.

If you are not a lawyer, or are not being supervised by a lawyer, you cannot give **legal advice**. You can tell your clients about the provisions of the law and about any recourse they can take to address discrimination. You do not have to be a lawyer to represent claimants filing human rights complaints or those appearing before human rights tribunals. However, there are responsibilities that come with this role, such as providing correct information and meeting statutory and commission imposed deadlines.

WHEN SOMEONE CALLS

When someone calls, you first need to ask the caller to describe the problem they are facing. You do so to ensure that the problem is related to human rights and discrimination. You may have callers who feel strongly that their rights have been violated, although the conduct is not illegal under human rights law (for example, where the unfair treatment does not relate to a protected ground of discrimination). In these circumstances, you will need to clarify that the action was not contrary to human rights law, although it may have been unfair. In this case you may refer the caller to alternative services.

However, if the information indicates that there has been a human rights violation, you will need to find out:

- The caller's name and contact information
- The name of the landlord, property manager, rental agent, superintendent, or anyone else involved in the discriminatory conduct
- Contact information for the landlord and others involved
- The size, rent, and address of the apartment in question
- When the apartment is available for occupancy
- What was said between the caller and landlord
- The names and contact information of any witnesses
- If the caller found the housing through an advertisement
- If the caller has good credit and landlord references
- In cases where the caller has poor credit or references, you need to find out why. If the caller paid rent at this level in the past
- If the caller can provide a landlord reference (even from another jurisdiction)

In cases where a person is denied housing, you will also need to know the date the application was completed, the date of any telephone inquiries made to the landlord and any other follow up.

It is very important that the caller makes detailed notes of their experiences as soon as things happen. You should advise your client to write down as many details as he or she can remember and have them sign and date the notes. If the discrimination is ongoing, advise the caller to keep a "note log".

Tips on How to Conduct Intake Calls⁴⁷

Skills	Example
Listening	Ask open ended questions ("How can I help you today?") and listen patiently and carefully. This is essential for gathering information and it also helps build rapport and trust.
Attentiveness	Confirm that you are hearing and understanding the caller by occasionally repeating back what the caller says. For example, "So what you're telling me is..." "So, as I understand things...". This shows that you are listening, and makes sure that there is no miscommunication.
Respect	Be respectful at all times.
Pro-active questioning	Follow up any inconsistencies, and collect more information instead of less. You can best advocate for someone if you are fully informed. You do not want to be caught off-guard by the landlord. Also, if the caller is getting off track by explaining events that do not relate to the issue of discrimination, use questions to steer that caller back to the human rights issue.
Respecting privacy	Do not ask personal questions unless they are necessary. For example, do not ask details about a person's disability if this information is not offered and is not relevant.
Educating	Do not assume that a caller understands the relevant human rights legislation or the complaint process. Take the time to educate your caller on the law.
Validating the caller's experience	Explain what discrimination means based on the human rights Code or Act. If the caller's case is not strong, let them know you are concerned that an adjudicator may not have enough evidence of discrimination. Do not tell callers that you do not think they have experienced discrimination.
Limiting contact	While you want to be friendly and approachable, always be professional and establish clear boundaries.
Note-taking	Make detailed and dated notes during and after the telephone conversation.

⁴⁷ These tips are based on a strategies developed by **Downtown Legal Services**, a student legal clinic associated with the University of Toronto Faculty of Law.

Handling Difficult Calls with Clients⁴⁸

Type of Problem	Possible Cause	Possible Approach
Emotional outburst	<p>Client shows signs of stress</p> <p>Client is dissatisfied with the progress of the case</p>	<p>Be understanding and investigate the cause. Empathize with the client's frustrations. Go over the facts of the case and explain what action has been taken. Explain that it is not always possible to get an immediate resolution, that challenging human rights violations can take time.</p>
Attached client	<p>Client is in a desperate situation</p>	<p>Set clear boundaries. If you feel that the calls are excessive and are interfering with other casework, you can ask the client not to call you. Let them know that you will call as soon as you hear back from the other side.</p>
"Rambling" client	<p>Client is emotional or has difficulty communicating</p> <p>Client is lonely</p>	<p>Direct the conversation. For example, "I need to discuss X with you at the moment and we can return to Y later." Set clear boundaries while remaining empathetic. Signal when the call is done by thanking the client for their time. Let them know that you will be in touch shortly.</p>
Client picks a fight and will not listen to you.	<p>Emotional difficulty or mental illness</p>	<p>Detach yourself from the situation. It may call for more courtesy, more firmness, more tact, or more guidance on your part. However, the main thing is not to be drawn into the client's dynamic. You can terminate the call at any time and hang up. Don't lose your temper. Remember, it doesn't matter whether the client is behaving reasonably or not - your job is still to manage the situation professionally.</p>

⁴⁸ These are based on strategies developed by **Downtown Legal Services**.

Intake Case Management

You must establish a formal intake case management system. The following section describes some key components of this system.

Service-Time Protocol: Individuals experiencing discrimination related to their housing often need urgent assistance. If they have applied for an apartment and been turned down, there may be very little time available to get them that apartment. It is important to establish a protocol regarding the maximum length of time it will take you to get back to a caller. We suggest that 24 hours be the maximum. However, if possible, calls should be returned the same business day. This service-time protocol should be explained on the organization's intake telephone message so that callers know what to expect.

Intake Forms: Start your intake case management system by developing a standard intake form. Important components of your intake form include:

- Date of intake
- Name of staff/volunteer who took the intake
- Detailed contact information for the client
- Detailed contact information for the landlord, property manager, etc.
- Selected personal information (family status, income source, sex)
- How the client came to contact the organization
- Ground(s) for discrimination
- Type of service provided by the organization (was this summary advice, a full-blown investigation/representation, public education, referral)
- Final outcome (Did the person get the housing or accommodation required? Did that person file a complaint?)

Not all of this information will be collected in the initial intake. Some will be completed during the case or after the file is closed. The rest of the form should provide space for the advocate's notes.

The demographic information CERA collects is extremely important. While some of the statistical information may appear irrelevant to the case, it can assist with public education and advocacy in the future. It lets us develop an understanding of who we are serving, and who is experiencing discrimination with respect to housing. We regularly use the demographic statistics we collect to advocate with and educate

policy-makers, landlords and the general public on the "face" of discrimination in housing.

Note-taking: Note-taking is a critical part of assisting human rights claimants. You need to take notes on each conversation you have with the client, the landlord, witnesses or anyone involved in this case. You also need to document any other action you take related to the case and any action that needs to be taken. Notes on conversations you have with the landlord are particularly important. Document these conversations as soon as possible after they occur. Write down as much detail as you can. If possible, quote the person directly. Use the standardized witness statement form if your local human rights body has one. If there is no standard form, you may want to work with your human rights commission or tribunal staff to develop your own.

Try to make the notes as complete as possible while limiting the amount of time you spend note-taking. It will take you some time to find an approach that helps you do this well.

It is also important that you put the date and time beside each entry. If more than one person is working on the file, put your initials beside each of your entries.

These points are important. You could be working on this case for months (or years if it involves a formal complaint). You want to take notes so that anyone reading the file can understand what work has been done. Those notes may become very important if your client files a human rights complaint. Advocates should not hesitate to document all relevant information, even if it does not help the client's case. If you are a lawyer or supervised by a lawyer, your case notes are privileged and should only be used or seen by your staff. No Commission staff or any respondent should ever have access to your file. It is critical that your client knows that these discussions are completely confidential. If clients feel that what they say to you could be used against them in the future, they will not tell you everything you need to know, and you will not be able to do your job.

Electronic Intake Database: While you may not have a large human rights caseload, it is useful to develop an electronic database for intake files. This makes it easy to quickly determine the status of a file and to generate statistics related to the caseload as a whole. It will also help you easily identify conflicts (i.e. where working with a new client may put you in the position of acting **against** a former client). It is possible to set up a simple database using a spreadsheet program such as Excel. If your organization has many ongoing

human rights files, you may even consider purchasing case management software designed for small legal firms. A number of different software packages are available although they can be expensive.

Tickler Systems: When a formal complaint has been filed with a human rights body, deadlines become significant. For example, you will have specific timelines for responding to documents or appealing a decision. A “tickler” system is a system that reminds caseworkers of limitation periods, mediation or hearing dates, deadlines for submissions and appeals, and other important time-sensitive matters. A tickler system can be as simple as a sheet of paper that is posted somewhere you can easily see it. It should have space for the case name, the action to be completed and the deadline. You can also use a wall or electronic calendar. The tickler sheet should be updated whenever you receive formal correspondence that includes a timeline for response.

GATHERING EVIDENCE

Your client can only successfully challenge the discrimination if there is sufficient **evidence** to support their allegation. You and the client need to develop a plan to get the necessary evidence assembled. Ideally, you will want to gather evidence that directly confirms that your client was refused for a discriminatory reason. If you cannot gather this evidence, then you need to have evidence that there was no valid, non-discriminatory reason to turn down your client’s application, or that the landlord lied to your client. Here are some examples of evidence that may support a claim of discrimination:

- Where the landlord told the individual that the apartment was rented but ads for the apartment continued to appear. Have the person keep those ads as proof that the landlord lied about the availability of the apartment. However, sometimes ads are booked in advance or continue to run even when there is no apartment available. Your client needs to verify the availability of the apartment by having someone else telephone the landlord.
- If possible get a photocopy of the completed application form, before handing it in. Your client may believe that they were denied because they receive social assistance. The application form may include information necessary to conduct a credit check. If your client has a good credit record, shows good landlord references, and lists social assistance as their source of income, the application form may be evidence of discrimination. Similarly, if the person

believes their application was denied because they have children, an application form that asks for the ages of all prospective occupants could be evidence of discrimination. Application forms are also useful to prove **when** the individual applied for the apartment.

- If a landlord says an application was refused because of credit problems, a credit report obtained from the credit bureau showing a good credit rating will be useful in challenging the landlord's credibility.
- Get a witness statement from someone who has "tested" the situation. There are a variety of ways to set up a "test". One way is to have another person telephone the landlord after your client has been denied to see if the discrimination is repeated. It helps if the tester uses similar criteria to your client (for example, letting the landlord know that they have children, if that is the reason the client was refused). Alternatively, you or your client can get someone with different characteristics to apply, to see if the landlord will offer the apartment.
- Sometimes it is as easy as having someone call, ask about the availability of the apartment and then ask the landlord about their tenant selection policies. For example:

Witness: "I'm calling to see if the one-bedroom apartment you advertised in "For Rent" is still available."

Landlord: "Yes it is."

Witness: "Would you rent to a family with one child?"

Landlord: "This apartment is only for a single person or a couple."

Staff or volunteers from community-based organizations can be ideal "testers" as they will generally be seen to be credible witnesses.

NEGOTIATING WITH LANDLORDS

If your client still wants to rent the unit, or wants the landlord's co-operation in accommodating a disability, etc., explain that you will call the landlord to try to resolve the problem. Get as much useful information as you can before you telephone the landlord. Ask if your client has good landlord references and ask whether there have been any problems with

overdue accounts or defaults on rent that may show up in a credit rating. Explain that these are what landlords look for when deciding whether or not to rent to someone. If your client has a lot of "selling" features, it will be easier to negotiate with the landlord.

Negotiation with a landlord will typically involve telephone conversations, written correspondence or providing public education and training materials. Below are steps you can follow when contacting a landlord:

- Identify yourself and your organization. Let the person know that you are calling on behalf of a specific client. Be prepared for the landlord to become defensive or deny all knowledge of the situation.
- Explain your provincial or territorial human rights legislation and who it protects from discrimination, as it applies to this situation.
- It may be necessary to advise the landlord that their behaviour or practice (as you understand it), is contrary to human rights law.

Some landlords will engage in a conversation with you, some will hang up and some will ask for correspondence in writing. You are more likely to engage the landlord in conversation if that landlord does not feel attacked or threatened.

If a landlord is willing to speak with you, then take the opportunity to advocate for your client. You will have to gauge which approach is most appropriate. For example, you can:

- "Sell" the client. For example, tell the landlord if your client has good landlord references and a good credit rating.
- Be prepared to "myth bust". For example, you can explain that tenants receiving social assistance are relatively low risk tenants. They have a stable source of income that is unlikely to drop dramatically. They know how much they are going to get each month and can budget accordingly.
- Try to get the landlord to think of what it would be like to be in your client's position.
- Explain or even read the relevant portions of your Human Rights Code or Act.
- Sympathize with the landlord. Let them know that you understand how difficult it is to keep up with landlord/tenant legislation and other statutes. However, let the landlord know that human rights law takes precedence over all other legislation in the province/territory.
- Let them know that you understand that people can violate human rights laws without realizing what they are doing. That a particular

policy or practice may be contrary to the law does not mean that the landlord intended to discriminate.

- If there are witnesses, make sure the landlord knows this.
- Explain that it is in everyone's best interest to avoid a lengthy and expensive human rights complaint.

If the landlord hangs up or demands something in writing, take the opportunity to send a stern letter that:

- sets out the relevant provisions of the provincial or territorial human rights law
- explains how and why the landlord has contravened them
- tells the landlord that they may be the subject of a human rights complaint or application to a human rights tribunal.

Let the landlord know that you can be contacted and that you look forward to resolving the matter without filing a formal complaint. The letter might include a section of a relevant judgment from your jurisdiction or a human rights commission policy if available. If no judgment is available in your jurisdiction, then you may rely on case law from other provinces or territories, which is not binding, but certainly persuasive.

Handling Difficult Calls with Landlords

Type of Problem	Possible Approach
Hostile/Yelling at you	Do not take it personally. Remain calm and focused. Do not lose your temper. Write down everything. End the call if the hostility continues and write a letter to the landlord instead, outlining the relevant case law and the resolution you are seeking.
Refuses to believe that they have violated the law	It often takes something in writing to convince a landlord that their actions are against the law. Write a letter to the landlord and attach educational materials on human rights. This saves you from having to argue with the landlord about it over the phone. It also gives the landlord some time to reflect on the issue.
Denies remembering your client	A landlord may claim not to remember your client, even though they dealt with your client that day. Have your client call the landlord immediately, as a reminder. If your client has a copy of a completed application form, mention this to the landlord.
Tries to discredit your client	Landlords may make personal attacks on your client because they feel it somehow justifies their act of discrimination. For example, a building has an adult-only policy and the landlord is attempting to evict a family with a young child. You explain to the landlord that this is discrimination based on family status. In response, the landlord makes remarks about your client being a neglectful parent and that neighbours supposedly wanted to call Children's Aid. It is natural to want to defend your client, but try not to engage in an argument over character. Simply inform the landlord that you are not convinced that what you are being told is true and that this information is irrelevant to the issue.

In smaller communities, where there is a greater likelihood that you will know the landlord you are negotiating with, the strategy is different. The landlord may not immediately hang up on you or refuse to return your calls. There will also be a greater likelihood that the landlord will be concerned about how the community will see this behaviour. These are significant advantages. Advocates will probably want to hold back on the "hard ball" approach to advocacy, and focus on a gentler - but still persistent - negotiating style.

DRAFTING A FORMAL HUMAN RIGHTS COMPLAINT

If you cannot resolve the problem through negotiating with the landlord, you may help your client file a human rights complaint with the human rights commission or the human rights board/tribunal. Generally, human rights commissions and tribunals require a complainant to complete a complaint form or questionnaire. This form asks for an explanation of the basis of the complaint. In some jurisdictions, such as the Yukon and Quebec, there is no particular form to complete. Complainants need only submit something in writing detailing their experiences. While human rights commissions can provide some assistance in completing complaint forms/questionnaires, it is best not to rely on this service. Advocates play an important role in ensuring that complainants put forward the strongest case possible.

In general, complainants should describe their experiences of discrimination in a simple and straightforward manner. They should be prepared to file their complaint as soon as possible after discrimination has occurred.

Below, you will find a discussion of the approach CERA staff use to draft complaints for their clients. While these strategies have been developed in the Ontario context, they should be relevant to anyone drafting a complaint.

The Components of a Complaint

The first paragraph of the complaint should explain who the complainant is, and should set out the fact that the complainant is a member of a protected group under your human rights legislation. For example, if the complainant was discriminated against because of her family status and sex, it could read: "I am a single mother with two children..." If the complainant was discriminated against because he is receiving social assistance, the first paragraph should mention that the complainant receives social assistance.

The next few paragraphs should **briefly outline** how the complainant's rights were violated. This section needs to be written in the first person (for example, I went to rent an apartment and I found...). The complaint does not have to be overly detailed and where exact dates are not available, approximate dates can be used. It is better to say, "on or about December 16, 2005" or "in approximately mid-April" than to provide an exact date that you cannot prove later. It is also best to put events in chronological order.

If the landlord made a directly discriminatory remark, put that in quotes. For example: The superintendent Jim Green said, "We don't rent to people in wheelchairs because we don't have a ramp."

It is very important that the narrative portion of the complaint, the "story", shows a **clear connection** between the behaviour of the landlord or their agents and the ground/s of discrimination. It is not enough for a complainant to say that she is receiving social assistance and that the landlord refuses to make necessary repairs to her unit. In this case, the complainant needs to show how her source of income is related to the landlord's failure to do the repairs. Include only the facts that are necessary to back up an allegation of discrimination. Do not feel compelled to include all of the details. While the complainant must provide sufficient information to allow the landlord to prepare for the allegations against it, case law has suggested it is not necessary to detail the evidence in support of the facts.⁴⁹ In other words, the complainant need not "show her hands" in the complaint itself.

Once you have documented the complaint and the facts surrounding the allegation of discrimination are complete, describe the section or sections of the human rights legislation that have been violated. This information is usually left for the last one or two paragraphs of the complaint. For example:

I believe that [...Landlord's name...] refused to rent to me because I am in receipt of income assistance.

Accordingly, I believe that my right to equal treatment with respect to tenancy without discrimination because of social condition has been infringed contrary to sections 5 and 12 of the *Human Rights Act*, S.N.W.T. 2002, c. 18.

Who Should be Included in the Complaint

Each individual or company involved in the discrimination should be identified in the complaint. For example, a superintendent who works for a property management company may be the person who turns down someone's application. The superintendent may say, "We don't rent to families with kids". In this case, the complainant should identify the superintendent, the property management company and the owner of the property in the complaint. Landlords are legally responsible for the actions of their staff and agents. Even if the owner of the property has no idea that the property management company is refusing families with children, the owner is still liable. Often, a complaint is filed

⁴⁹ *Ontario (Human Rights Commission) v. Ontario (Ministry of Education)* (1986), 9 C.H.R.R. D/4535 at D4536-4537.

against the superintendent, property manager, property management company and the owner of the property. In most jurisdictions, the complaint forms or questionnaires give complainants an opportunity to include more than one respondent.

Separate complaints should be filed for *each person* alleging discrimination. If the person involved cannot independently file a complaint (for example, a child), it can be filed through a “litigation guardian” (the child’s mother or father or the individual's legal guardian).

On the following pages you will find examples of “bad” and “good” complaints.

Sample Bad Complaint

- I have been living at Suite 4 - 23 Equality Street in Edmonton for the last 11 years. I moved in on January 15, 1995.
- I love my apartment because it faces south and has a large balcony that I can sit on in the summertime. Over the years, I have had problems with repairs in the unit, but everything has been fixed.
- I was diagnosed with MS when I was 28 years old. In January of this year my MS began to worsen. I had to stay in the hospital for three weeks in February because I needed surgery. Since having the surgery, I have required the use of a wheelchair for mobility and now I need a roll-in shower too.
- I found out on March 1, 2006 at 3pm from my doctor that the RRAP program could pay for a roll-in shower in my home. I was surprised because I did not know that any organization could help me in this way.
- I spoke with my superintendent about the installation of the shower. I was in the hallway of my building and he was vacuuming the carpet.
- He was very rude and curt to me. He told me that there was nothing he could do and that I would have to speak with the property management company.
- I think that he just did not want to help me and that he does not like me because I once complained about the garbage in the building. I have also complained in the past about broken screens on my window, and water damage on the ceiling of my bathroom.
- I saw him again and he said that I would probably have to leave Edmonton and go on a waiting list.
- I wrote a letter to the company on March 7, 2006 and asked if I could have a new shower installed.
- I did not receive a response for two weeks and when I did they said no.

Sample Good Complaint

- I have Multiple Sclerosis.
- For the past 11 years, I have been living in an accessible residential apartment at Suite 4 - 23 Equality Street in Edmonton. My apartment is managed and operated by Bias Property Management.
- As a result of my condition, in February 2006, I had to undergo surgery. Since having the surgery, I have required the use of a wheelchair for mobility. I also now require a roll-in shower.
- On or about March 3, 2006, I found out from my doctor that the Canada Mortgage and Housing Corporation Residential Rehabilitation Assistance Program (RRAP) could pay for a roll-in shower in my apartment.
- I was happy because this would allow me to continue to live independently.
- On or about March 4, 2006, I spoke with the superintendent, John Stiles, about the installation of the shower.
- Mr. Stiles advised me that I needed permission from the property manager, Bias Property Management, but that their policy was to transfer me to another unit.
- On or about March 5, 2006, I spoke with Mr. Stiles again and found out that the only units with roll in showers were on the outskirts of Edmonton and that there was a long waiting list for them.
- I became concerned because I have lived in central Edmonton for 27 years and my medical care and services are within easy commuting distance.
- On or about March 7, 2006, I sent a letter to Bias Property Management requesting a roll-in shower for my unit.
- I explained my situation in the letter and suggested that Bias Property Management apply to RRAP for funding to offset the costs of the shower. I also attached a letter from my doctor confirming my need for the shower.
- On or about March 7, 2006, I received a letter from Tina Kim, the Operations Manager of Bias Property Mgmt., advising me that they would not install the shower in my unit.
- The letter did advise me that I was welcome to transfer to a unit outside of Edmonton when one came available and that if I wanted to do so, I should put my name on the company's waiting list.
- The letter said that this was company policy and that it could not be changed.
- I believe that Bias Property Mgmt., by refusing to accommodate my needs as a disabled tenant in a manner that most respects my dignity, has failed to abide by its obligations under the *Human Rights, Citizenship and Multiculturalism Act*.
- I believe that my right to equal treatment with respect to any term or condition of the tenancy of any self-contained dwelling unit without discrimination because of physical disability has been violated contrary to section 5(b) of the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, Ch. H-14.